UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 18

WDC ACQUISITION, LLC. and District Lodge 6, International Association of Machinists And USW/AFL-CIO/CLC and USW GMP Counsel 17B	Case No. 18-CA-220488 18-CA-224086 18-CA-224176 18-CA-235532 18-CA-238129 18-CA-238193 18-CA-238883

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Respondent's Post Hearing Brief

When a distressed company emerges from bankruptcy, like the business here, its future survival depends on the ability to control labor costs, particularly where nearly fifty- percent (50%) of the product cost is labor. Thus, setting the initial terms of employment is critical to the Employer's chance to succeed. In fact, given the Employer's ongoing operational challenges, lack of liquidity, and need for substantial investment to sustain operations, any unexpected change in the initial terms of employment would almost certainly result in the business failing. The evidence is clear that under current and long-standing Board law, no actions taken by this Employer prohibited setting initial terms of employment.

Factual Background

Wellman Dynamics Corporation ("Wellman Dynamics") manufactured components for helicopters, missiles, as well as rocket and jet engines for use in military and commercial aircraft. On September 13, 2016, Wellman Dynamics filed a voluntary petition for bankruptcy in the United States District Court for the Southern District of Iowa, Bankruptcy Case No. 16-01825-als11. (Resp. Ex. A). The assets of Wellman Dynamics were auctioned on February 26, 2018 (Id. p. 2-3). The winning bidder for Wellman Dynamics's assets was a company called TCTM Financial FS LLC ("TCTM") which assigned all its rights and obligations under the purchase agreement to WDC Acquisition, LLC ("WDC"). (Id.) WDC closed the acquisition of the Wellman Dynamics assets on May 7, 2018. (TR. 205:1-2).

At the time of the bankruptcy, the Wellman Dynamics facility was in a state of absolute disrepair. Wellman's then-CEO, James Mahoney testified the roof was leaking, and required maintenance to critical production equipment was seriously delayed because the company could not afford it. (TR. 513:18-514:1). Mahoney also testified that because of a lack of cash, the

business did not have any raw materials and supplies at the time of the sale in order to produce products. (TR. 527:21-25). More important, witnesses Jim Pinto and Mahoney testified that because of the bankruptcy there was significant concern that Wellman Dynamics would lose commercial market share. (TR. p. 466:24-467:5; 514:3-12).

On March 12, 2018, the Bankruptcy Court approved an asset purchase agreement for the sale of the assets of Wellman Dynamics to WDC. (Resp. Ex A). Under the Asset Purchase Agreement, WDC had the right to hire or refuse to hire any employees of Wellman Dynamics and had the right to set its own "terms and conditions" of employment for all employees. (Resp. Ex A. P. 73, Resp. Ex. B,). While there were three labor organizations representing employees at Wellman Dynamics, the Bankruptcy Court Order specifically permitted WDC to refuse to accept the collective bargaining agreements, which it did. (Resp. Ex. A, at 11). Prior to commencing operations, WDC notified the Bankruptcy Court that it would not assume the collective bargaining agreements of Wellman Dynamics. (Id.) In bankruptcy, WDC also notified the Court it would not assume any of the Union pension plans. (Id.)

WDC knew that, for the business to survive, significant changes to the failed Wellman Dynamics business model were required, including changes to employee wages and benefits. (TR. 486:22-487:13). WDC knew that an offer of employment to employees at WDC would be different than the employment terms at Wellman Dynamics. (TR. 525:6-18). While WDC was willing to hire all former employees of Wellman Dynamics, those former employees each needed to apply to WDC and accept a new offer of employment. (TR. 60:19-22; 351:23-352:14).

Prior to the sale, WDC asked the then-current Wellman Dynamics CEO Mahoney if he would remain as CEO of WDC. (TR. 517:4-12). Beginning in March 2018, Mahoney provided regular updates to employees on the sale of the assets of Wellman Dynamics in the Bankruptcy

Court. Mahoney provided three (3) written updates (TR. p. 517:18-518:3). In addition, he held "town hall" meetings to advise employees on the process of the sale of the assets. (TR. 518:4-16). During these updates, Mahoney was not unsurprisingly asked about the status of the former Unions and he routinely demurred, saying that no decision had been made regarding the Unions. (TR. 520:2-13). Testimony from Union employees claimed Mahoney said there would be "no union" after the sale. (TR. 17-25, 107:19-22, 125:12-18; 350:13-15; see also GCX 108, 110). Mahoney denied making such comments and his testimony is credible on that fact. (TR. 521:25-522:5). Further corroborating Mahoney's testimony is the training documentation. (Resp. Ex. C, p. 9). All supervisors, including Mahoney, were trained and instructed not to discuss the Unions.

> **Avoid <u>all</u> discussions on the future state of the former Unions** - stick to published materials. Do not speculate. Do not express opinions. Do not get drafted into discussion and debates.
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> * * *
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> **Talk of Union Decertification--<u>never</u>** participate in this topic of discussion. It's very legal and complicated. And the Company must avoid participation in this type of protected union activity.

(Resp. Ex. C, p. 9).

Knowing that employment wages, benefits and work rules would have to be different, yet competitive, Mahoney worked with consultants Pinto and Joe Porto to develop a wage and benefit package for WDC to offer to former Wellman Dynamics employees. (TR. 494:10-18). Mahoney told Wellman Dynamics employees that since the transaction had not closed, he could not offer the specific details of the terms that would be offered to employees in their offer packet, but were eventually provided to employees upon their termination from Wellman Dynamics. (Resp. Ex. E p. 5). Mahoney told employees there would be "competitive wages and benefits" from the new company that would provide employees with "market level" wages and benefits. (Resp. Ex. E p. 6).

Porto testified as to his concerns that while the intent was to offer employment to all former Wellman Dynamics employees, WDC had no idea how many of those employees would come to work with WDC. (TR. 489:17-21). Indeed, Pinto was also concerned the surviving entity would not have enough employees to operate the business once WDC took over in May 2018. (TR. 489:22-24). When WDC made offers of employment, the wages, insurance, PTO and other benefits were similar to, but not the same as, those offered by Wellman Dynamics. (TR. p. 465:8-9). There were critical differences. For example, WDC eliminated the defined benefit pension plans and adopted a 401(k) for retirement. (TR. 148:10-12). WDC provided a new employee handbook, partially developed from past practices and prior Union agreements, that contained new work rules and a change in the disciplinary process. (TR. 470:2-7; 487:1-13).

Wellman Dynamics employees worked until May 4, 2018, at which time Wellman Dynamics terminated all Wellman Dynamics employees. (TR. 351:20-352:2). On May 7, 2018, WDC acquired substantially all the assets of Wellman Dynamics, and since Wellman Dynamics no longer had any employees or assets, Wellman Dynamics ceased to operate. WDC began operating the facility at 12:01 a.m. on May 7, 2018. (TR. 522:18-21). As of May 7, 2018, while all employees were given offers of employment under the new terms and conditions, no hourly employees from the bargaining unit had accepted jobs. (TR. 525:6-23). When WDC began operations on May 8, 2018, it had no idea how many employees of Wellman Dynamics would accept a job offer and begin working. (TR. 524:5-8, 22-24; 526:9-12). Both Mahoney and Pinto were concerned that not all employees would work for the new company, and they could have trouble manufacturing the product for the customers. (TR. 489:17-21; 525:22-25).

By May 9, 2018, 99% of the former Wellman Dynamics employees accepted WDC's job offers and began working for the company. Prior to the sale and for the first few weeks after the

sale, as Mahoney walked the plant, he was approached by several employees saying they did not believe the Union was necessary in continued operations. (TR. 481:23-25). Mahoney testified that as a result of those conversations, he had a good faith belief the employees did not want to be represented by the Union. (TR. 542:11-19). When the Unions requested recognition, Mahoney sent each a letter stating he had a good faith belief they no longer represented a majority of the employees in their bargaining units. (TR. 532:10-17, Exs. F, GCX 05). After less than two (2) months of operation, it became clear to Mahoney that employees wanted the former Unions to represent them. He directed communication to the Unions stating WDC would meet to begin bargaining. (TR. 36:9-11, 17-24, Ex. GCX 06). Shortly after sending the letter, WDC began bargaining with each of the three (3) Unions. In fact, WDC has entered into an agreement with the IUOE, which withdrew its charges in this case. (TR. 474:3-4).

Once it recognized the Unions in August of 2018, WDC allowed USW Local President Ben Ingersoll to represent employees as the Union steward. (TR. 212:1-19). During his work day, Ingersoll could meet with employees when issues would arise where a Union steward was necessary. After a few months of allowing Ingersoll to represent employees, it became apparent to managers he was spending a disproportionate amount of time with one particular employee who was also his girlfriend, and who had filed a grievance. (TR. 219:1-8). To ensure Ingersoll was acting on Union business, WDC enforced a rule that required the Union steward to get permission from his supervisor before leaving the work area (GCX. 114). Such rule was consistent with the old contract. (TR. 246:22-247:4, Ex. GCX 111). In this regard, WDC simply followed the same rule that was set forth in the old contract between the Union and Wellman Dynamics. (GCX 111). On one occasion, Ingersoll did not obtain permission, as required by WDC, so Ingersoll was issued

a disciplinary notice. The disciplinary notice was a written warning, requiring that he obtain supervisor permission in order to conduct Union business. (TR. 237:4-7, Ex. GCX 113).

When it set the initial terms of employment, WDC provided employees with an absenteeism policy that was different from the attendance policy at Wellman Dynamics. (TR. 577:2-10). Essentially, the difference was that employees would have fewer absences prior to being disciplined. (TR. 142:6-23). Since WDC had the right to set initial terms, it had the right to establish an absenteeism policy for employees. Under the new policy, employee Deborah Graham was terminated for violation of the WDC attendance policy. (TR. 296:4-5). Prior to the hearing, the parties stipulated that Deborah Graham was terminated because of her absenteeism record under the WDC policy. As demonstrated at hearing, because WDC had the right to set the initial terms, Graham's termination was appropriate and consistent with the policy.

In February 2019, during negotiations, the parties agreed on language allowing employees to take up to 24 hours of PTO without advance notice; and further agreed that they would implement that provision immediately, the so-called emergency PTO. (TR. 419:5-12, Ex. GCX 116). On March 23, 2019, more than one-third of the employees in the core area took emergency PTO in order to watch the Iowa Hawkeyes play basketball in the NCAA tournament. Notably, employees were both calling off and abandoning their shifts. When core room supervisor Crystal Mack asked what she should do with the significant and sudden loss of the employees, she was directed by Mahoney to send the remainder of the employees home for the day. (TR. 479:3-5). Mahoney consulted with Pinto, Mack, and Porto. During the course of the conversation, the group expressed concern about a safety risk and additional risk of scrap by having the remaining employees work in areas where they lacked sufficient skill. Thus, the employees were sent home.

(TR. 496:14-497:17). Sending employees home was a viable option and was within management rights.

WDC had the Right to Set Initial Terms and Conditions of Employment

At the core of this case is whether WDC has the right to set the initial terms and conditions of employment. Under the April 2019 *Ridgewood Health Care Center, Inc.*, 10-CA-113669 and 10-CA-136190 (NLRB 2019) decision, the Board made it clear that distressed employers must be able to set the initial terms and conditions of employment and employers, like WDC, did not have to consult with the union prior to setting the initial terms. In *Ridgewood Health Care*, the NLRB established a standard for employers like WDC to set the initial terms of employment even if it is a successor employer. Specifically, the NLRB found that a successor employer would forfeit the right to set initial terms *if* it engaged in discriminatory hiring practices that would make it impossible to determine if there was a perfectly clear successor. (Id. at 7-8). In *Ridgewood Health Care* even though the employer (1) refused to bargain with the union, (2) stated there would be no union, and (3) discriminatorily refused to hire four employees, the Board held that Ridgewood Health Care was free to set the initial terms for unit employees. (Id. at 9). In other words, in the face of those actions, the Board held the employer did not engage in behavior that forfeited its rights to set initial terms.

Two critical factors from *Ridgewood Health Care* are significant here, (1) discriminatory refusal to hire was not sufficiently grave enough to forfeit the right to set initial terms and conditions and no action by WDC was alleged to be as severe as discriminatory refusal to hire; and (2) Wellman Dynamics' distressed financial condition, like that of Ridgewood Health Care, further underscores the need for successor entities to set more sustainable terms and conditions in

order for there to be any jobs for unit members. In *Ridgewood Health Care*, the Board emphasized this latter point that imposing conditions:

> [m]ay be a deterrent to employers contemplating unlawful hiring schemes, but it also risks job loss and consequent financial ruin for all employees in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect.

Ridgewood Health Care at 8.

Here, *Ridgewood Health Care* controls and dictates WDC must be able to set the initial terms. The critical analysis of *Ridgewood Health Care* that is particularly relevant here was the basis for the NLRB decision.

> Furthermore, the holding of the majority in *Galloway* undercuts the fundamental economic rationale in *Burns* for permitting successor employers to set initial employment terms. The wrong committed by the discriminatory hiring practices of a successor employer that would not in any event have hired all or substantially all of the predecessor's employees can be effectively addressed by the traditional make-whole remedies of reinstatement and backpay for affected employees. The wrong committed by the avoidance of a successor bargaining obligation can be effectively addressed by the imposition of a remedial bargaining obligation. But as the Supreme Court emphasized in *Burns*, many successors take over a distressed business that must undergo fundamental and immediate changes in employment terms to survive. Retroactive imposition of the predecessor's employment terms--with backpay and interest--on any employer who engages in discriminatory hiring to any degree runs counter to the principle that initial terms must generally be set by "economic power realities." The *Galloway* remedy may be a deterrent to employers contemplating unlawful hiring schemes, but it also risks job loss and consequent financial ruin for all employees in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect.
>
> The dissent contends that overruling *Galloway* will promote labor disputes. In our view, it will promote the survival of foundering businesses and preserve jobs. But even if the dissent is correct, we again take guidance from *Burns*. The Supreme Court stated that "[p]reventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will." 406 U.S. at 287.

Ridgewood Health Care Ctr., Inc., 367 NLRB No. 110 (Apr. 2, 2019)

In this case, WDC purchased the assets of a company that had filed bankruptcy twice and remains in a precarious economic situation to this day. The rationale in *Ridgewood Heath Care* is particularly applicable to WDC's situation. As the Judge is aware, WDC has recently negotiated a collective bargaining agreement with the IUOE.

Here, General Counsel argues *Advanced Stretch Forming*, 323 NLRB 84 (1997) controls because WDC's alleged conduct occurred prior to the sale, and thus it was not permitted to set initial terms of employment. WDC respectfully disagrees, and notes that in *Advanced Stretch Forming*, the Board relied on or cited to many of the cases that were tacitly reversed and seriously undermined by *Ridgewood Health Care*.

Specifically, the Board in *Advanced Stretch Forming* relied on *Spruce Up Corp.*, 209 NLRB 194 (1974) to apply the "perfectly clear" doctrine. A close reading of *Ridgewood Health Care* reveals the General Counsel's reliance on *Advanced Stretch Forming* to deny an employer the right to set initial terms if it engages in anti-union activity prior to the sale is misplaced. In the April 2019 *Ridgewood Health Care* decision, the Board said, "[i]n the months preceding the October 1 takeover, the Respondents' officials delivered conflicting messages to Preferred unit employees about their prospects for continued employment and union representation." There were no such conflicting messages here, Mahoney was clear on how the new company would proceed. *Advanced Stretch Forming* is factually distinguishable and therefore does not dictate the result suggested by the General Counsel.

Beyond that, whether the issue was discussed before the takeover is a distinction without a difference. In *Ridgewood Health Care*, the employer discriminatorily refused to hire former union members, a decision which itself demonstrates the employer made the decision before it hired

employees. As the Board has noted, refusing to hire employees because of union affiliation has a chilling impact on Section 7 rights, even more so than anti-union comments. *See Yonkers Associates*, 319 NLRB 1098 (1995). In this case, WDC offered employment to all Wellman Dynamics employees (union and non-union alike), and disputes it engaged in anti-union conduct. Certainly, if the severe action of not hiring employees because of their union affiliation is insufficient to disturb the right to set initial terms, then even the actions WDC is accused of, falls short.

In *Spruce Up*, the Board, in applying the United States Supreme Court's holding in *Burns*, held successor employers may set initial terms without bargaining, unless the so-called "perfectly clear" exception was triggered meaning the successor had plans to retain all the unit employees. Offering jobs to all employees of the predecessor is not determinative of the issue of being a "perfectly clear" successor. In *Spruce Up Corp*., 209 NLRB 194 (1974), the Board held the successor was not a "clear successor" even though the successor employer offered a job to all of the predecessor's employees. The Board found that since the employer changed the terms of employment offered to the former employees, the employment therefore depended on the employee's willingness to accept new terms and that created the possibility that the employees would not accept employment with the new employer. In that situation, the Board said that the acquiring entity was not a "perfectly clear" successor even though it may have planned to retain all of the predecessor's employees. *Id.*

Indeed, the Board in *Spruce Up* set very restrictive guidelines on when a "perfectly clear" successor would be found, emphasizing the restricted application and stating:

> The caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer,

> unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

209 NLRB at 195.

In this case, testimony was that all employees of Wellman Dynamics who were offered jobs by WDC on May 4, 2018 when they were terminated by Wellman Dynamics. (TR. 489:9-16). The offers made by WDC were different from the wages and benefits offered by Wellman Dynamics. (GCX 108; TR. 525:6-23). It is clear from the bankruptcy filing (i.e., not assuming the pension plan), the offer of the employment, and from all communications with employees that there were significant changes being made in wages and benefits at WDC creating the very real possibility that employees would reject the offer of employment. (TR. 489:17-21)

This case is markedly different from the cases where the Board found a successor employer to be a "perfectly clear" successor. In *Nexco Solutions, LLC*, 364 NLRB 44 (2016), the purchase agreement required the successor to offer employment to all of the predecessor's employees. In that case, the Board found that successor made all communications with employees with authority of the predecessor. *Id*. In this case, there was no such requirement that WDC hire the predecessor's employees. In *Canteen Co.*, 317 NLRB 1052 (1995), a divided panel of the Board said that since the acquiring company held bargaining sessions with the union prior to the acquisition, the acquiring company did become a "perfectly clear" successor. WDC had no such bargaining sessions.

The situation before the Board here is similar to *Plan Building Services*, where WDC offered jobs to all prior employees, but under changed terms and conditions of employment. 318 NLRB 1049 (1995). In *Plan Building Services,* the successor was not deemed to be a "perfectly clear" successor.

There has been no allegation that WDC discriminated against any former employees by refusing to hire them or that it committed any unfair labor practices prior to hiring. In cases where the employer unlawfully refuses to hire former employees, it cannot avail itself of the ability to unilaterally set initial terms and conditions of employment. In this case, all employees were offered jobs and there was no discrimination, so WDC had the right to set initial terms of employment.

WDC's only chance to survive was and is to change Wellman Dynamic's practices and mistakes, including wages and benefits that cannot be sustained. As Pinto testified, 50% of the cost of the product is labor, which is much higher than any business he had ever been involved with. WDC set initial terms it thought were competitive and doable and that employees would accept to allow the company a chance to succeed. We ask the Judge to be mindful of the Board's comments in *Ridgewood Health Care* as he considers this case.

> "[M]any successors take over a distressed business that must undergo fundamental and immediate changes in employment terms to survive. Retroactive imposition of the predecessor's employment terms--with backpay and interest--on any employer who engages in discriminatory hiring to any degree runs counter to the principle that initial terms must generally be set by "economic power realities."

Failing to follow those words could well be fatal to any business, including WDC as it works to keep 400 jobs in a small town like Creston. WDC had the right to set initial terms and it did so. The General Counsel's objection to that must be dismissed.

<u>There Were No 8 (a) (1)(3) and (5) Violations</u>

The General Counsel has alleged a number of other 8 (a) (1)(3) and (5) violations which are without merit. Each of those allegations will be discussed in the following paragraphs.

Termination of Deborah Graham under the Attendance Policy was Appropriate.

When it set the initial terms of employment, WDC established its own absenteeism policy. (TR. 142:16-18). The policy differed from the policy in effect at Wellman Dynamics because it allowed fewer employee absences before WDC imposed discipline. (TR. 142:16-23; 146:16-19). In setting this term of employment, WDC had the right to establish the policy for employees of the new company in order to reduce absenteeism. (EX. JX 01, 04). In 2018, there is agreement that WDC employee Deborah Graham violated the WDC absenteeism policy and had multiple disciplines for attendance violations, ultimately resulting in her termination. (EX. JX04). There is no fact issue here to be addressed by the ALJ, all parties stipulated that Graham's termination was appropriate under the WDC policy; thus if WDC had the right to set initial terms, her termination was appropriate. The parties also stipulated that under the Wellman Dynamics policy, Graham would not have been terminated. (Id.) Since WDC had the right to set its initial terms of employment, it had the right to discipline Graham under that policy. The charge is without merit.

WDC had the right to Limit the Union President's Unfettered Movement in the Plant.

Employees must remain in their work area during the workday in order to fulfill the job requirements. Once WDC recognized the Unions, it allowed Union president Ben Ingersoll to represent employees as a Union steward. In November 2018, WDC became concerned that Ingersoll was freely strolling through the plant and may not always be conducting Union business. (TR. 219:1-8). In fact, WDC was concerned that Ingersoll was spending a disproportionate amount of time with his girlfriend, who had filed a grievance. (TR. 219:1-8). As a result, WDC established a rule that required the Union Steward to obtain permission from a supervisor before he/she left the work area to attend to the Union business. (GCX 111). WDC simply followed a rule that was the same as a rule that was set forth in the old contract between the Union and Wellman Dynamics.

> **Section 4. Right of Visitation.** If it is necessary for the administration of the Agreement for a duly accredited representative of the Union to discuss a grievance with an employee and/or their Committee person during working hours, they shall contact the Company and arrange for an appointment with said person.
>
> (GCX. 2, P. 3).

The enforcement of this rule was not a surprise to the Union. Certainly both Ingersoll and Business Agent Stacy Anderson knew about the prior rule from the old contract. WDC was well within its rights to enforce a policy of the prior employer, one which should have been understood by Ingersoll and other Union members.

Discipline Under the Union Business Policy was Appropriate.

On February 15, 2019, Ingersoll was out of his work area discussing an issue with a supervisor. (GCX. 113). When asked if he had permission to be out of his work area, he admitted that he violated WDC's policy of obtaining permission. (Id.). The failure to obtain permission was a violation of the company policy and a violation of the prior Union contract. The company issued discipline to Ingersoll, which it had the right to do.

General Counsel sought to demonstrate that WDC had an anti-union bias and wanted to terminate Ben Ingersoll. The only evidence General Counsel used to advance this theory was the testimony of April Melroy, a former WDC HR employee. Melroy testified that she was told to draw up papers to terminate Ben Ingersoll. (TR. 388:12-21). Melroy's testimony and the underlying suggestion that WDC wanted to terminate the Union president because of anti-union bias is nonsense. HR Director, consultants Jim Pinto and Joe Porto all testified there was no desire to terminate Ben Ingersoll. (TR. 572:2-10; 495:9-25; 472:7-12). Not only that, in emails between Porto and Melroy, it was made clear that there was no evidence supporting termination and that after an investigation, no action would be taken. (TR. 401:15-402:21). General Counsel's efforts

to demonstrate an anti-union bias on the part of the management of WDC are unsupported by the record.

The Provisions Implemented by WDC Simply Created a New "Status Quo" from which the Parties would have to Begin Bargaining when the Duty to Bargain was no Longer Dormant.

The General Counsel also argues that a policy implemented by WDC requiring written permission was a violation of the policy. (GCX 114). WDC implemented a written form to validate the actions of the Union representative to ensure against disputes about whether a Union business representative was on Union business in the plant. The Company does not dispute that it did not bargain with the Union over the use of the form. Also, there was no discipline when the form was developed. WDC's implementation of the written form was a means to clarify use of the policy for obtaining permission and was an administrative policy that WDC had the right to implement. To be clear, WDC did not establish a new rule regarding permission to move outside of a work area--that rule was in the prior CBA that covered the USW employee's employment. WDC was within its right to require the written notification as an administrative requirement so that there would be no dispute about the permission granted and would create protection for the employee who was conducting the Union business. This was within the management rights of the Company and need not be negotiated with the Union.

Notice to Employees about Proper Bathroom Breaks is not a Subject of Bargaining.

During WDC's operations, employees took advantage of going to the bathroom whenever they wanted, which resulted in employees misusing bathroom breaks by taking long breaks from their work area during work hours. (TR. 550:8-18). In order to combat the misuse of the breaks, a supervisor provided a written reminder to employees of their obligation to use the restroom during breaks or to obtain supervisor's permission, which was consistent with the original handbook as

well. (GCX 117.). The company did not change its policy, and as a result did not have to bargain with the Union. In putting out the form, the supervisor put in writing the policies which WDC had implemented in its handbook was given to employees to establish initial terms of employment. WDC had the right to set initial terms and had the right to require employees to remain in their work area and not leave without permission.

WDC had the Right to Send Employees Home.

During bargaining with the USW, the WDC and the Union agreed to allow employees to take PTO without prior notice in response to concerns about losing employees due to a particularly brutal winter involving poor weather conditions. (TR. 419:9-12, GCX 116). The parties further agreed that this policy would be implemented immediately for such instances like inclement weather. (Id.) On March 23, 2019, over one-third of the work force in the core room took emergency PTO in order to watch the Iowa Hawkeyes play basketball in the NCAA tournament. (TR. 477:21-478:18). This was particularly troubling because, while some of the employees had previously taken the day off, several of the employees announced during their shift that they would leave work in order to go home and time to watch the basketball game. (TR. 552:2-5). That left the core room with two problems. First, it did not have sufficient employees to operate safely for that day. Second, if it were to reassign people, the remaining employees would be forced to work in areas where they did not have sufficient skills to make the products without creating scrap. (TR. 496:14-497:17). This issue caused core room supervisor Crystal Mack to ask Mahoney, Pinto and Porto what she should do. (TR. 552:6-19). The four discussed various options and ultimately determined because of the safety concerns, and because of concerns for increased scrap because of people working out of their area, the employees should be sent home and the department closed down. (TR. 552:23-553:4).

The General Counsel elicited testimony that the company had not taken similar action to send employees home presumably to suggest disparate treatment. However, the General Counsel did not establish that a situation like this one had occurred before. For example, the General Counsel did not establish that this number of employees had been gone or that employees had given such short notice for the departure. Under well accepted principles, management has the right to set working conditions and has the obligation to maintain a safe working environment. Because of concerns for safety and because of concern for increased scrap, management had the right to send employees home.

Here, the General Counsel contends this was a punitive action as a result of bargaining. It is a stretch to argue that the company was upset about the number of employees calling off or taking emergency PTO was a result of the bargaining. After all, the PTO was agreed upon and implemented. Instead, the company was appropriately concerned about the stream of employees abruptly leaving such that it was forced to shut down operations. WDC had the right and the obligation to make the decision it did to send employees home to ensure the safety and efficiency of the remaining employees at the WDC plant.

Accordingly, there was no unfair labor practices and WDC was entitled to set initial terms and conditions. The evidence at the hearing demonstrated that WDC offered employment that was economically realistic given the devastated situation within the old Wellman Dynamics. WDC followed the law, set new terms, and applied them lawfully. This matter should be dismissed with no further action taken against WDC.

Conclusion

When the assets of a bankrupt company are purchased, the Board has recognized the necessity of the employer setting initial terms and conditions of employment even in cases where

the employer has said it will not recognize a union. This acknowledgment by the Board is based upon the understanding that if the struggling business is going to have a chance to survive, the purchaser must be allowed to correct mistakes made by the prior company. In this case, WDC purchased a twice bankrupt company and set initial terms of employment it believed would allow the company to have a chance to survive. WDC hired virtually all of the employees on similar terms of employment. Despite not initially recognizing the Unions upon a good faith believe that the employees did not wish to be represented, in less than two months from the time the Unions demanded recognition, WDC agreed to bargain with the Unions. Such bargaining has resulted in an agreement with one of the three Unions in the facility. The law does not support punishing WDC in this case.

WDC asks that the Judge dismiss the complaint against WDC.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on **December 19, 2019** by:

__ U.S. Mail
__ Hand Delivered
__ Federal Express
__ FAX
__ Overnight Courier
X Other: E-Filing

Signature:_____